UNITED STATES
v.
F. E. GRAY and MRS. F. E. GRAY

IBLA 71-254 Decided November 6, 1972

Appeal from decision of Administrative Law Judge in contest number Oregon 3437, declaring mining claim null and void.

Affirmed.

Mining Claims: Contests--Mining Claims: Discovery: Generally

When the government contests a mining claim, it has only the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. The Government is not obligated to prove affirmatively either that the land claimed is nonmineral in character or that no discovery of a valuable mineral deposit within the limits of a mining claim has been made, and the government's mineral examiners are under no obligation either to rehabilitate discovery points or to explore beyond the current workings of a mining claimant in attempting to verify a claimed discovery. Where a government mineral examiner testifies that he has sampled the exposed workings on a claim without finding sufficient mineral values and that he observed no other mineralization to sample, a prima facie case of no discovery has been made, and the burden is thereafter upon the mining claimant to show by a preponderance of the evidence a discovery has been made.

Mining Claims: Discovery: Generally

The Department has repeatedly held that in order to constitute a discovery upon a lode mining claim there must be physically exposed within the limits of the claim a lode or vein bearing mineral of such quality and of such quantity as to warrant a prudent man in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine and that it is not sufficient that the exposed mineralization merely give rise to a hope or expectation that upon further exploration a valuable mineral deposit may be found.

Mining Claims: Discovery: Generally--Mining Claims: Determination of Validity

> Although a mining claim may have been valid in the past because of a discovery on the claim of a valuable deposit of mineral, the mining claim will lose its validity if the mineral deposit ceases to be valuable because of a change in economic conditions or exhaustion of the deposit.

APPEARANCES: Harold Banta, Esq., Banta, Silven, Young & Marlette, of Baker, Oregon, for the appellant; James Kauble, Esq., Office of the General Counsel, Portland, Oregon, U.S. Department of Agriculture, for the appellee.

OPINION BY MR. RITVO

Mr. and Mrs. F. E. Gray have appealed from a decision of March 9, 1971, by Administrative Law Judge Graydon E. Holt, 1/ declaring mining claims Orion Nos. 1, 2, 3, and 4 null and void for lack of discovery of a valuable mineral deposit.

The proceeding was initiated on behalf of the Forest Service by a complaint filed in the Oregon Land Office on July 25, 1968. In that complaint the government alleged that minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery and that the land embraced by the claims is nonmineral in character. Hearings were held in Baker, Oregon, on July 23, 1969, hereafter cited as B-Tr., and in Portland, Oregon, on November 13, 1969, hereafter cited as P-Tr.

The 6 claims, which are situated in the Wallowa-Whitman National Forest, Baker County, Oregon, were located in approximately 1903 by Dr. Walter Lovejoy. Mrs. Gray was married to Addison Lovejoy, one of Dr. Lovejoy's two sons, who died in 1946. Mrs. Gray married Mr. Gray in 1949.

Although the claims were worked for gold during the lifetime of Dr. Lovejoy, no member of the family who remembers the details of this operation is still living. It appears that major production stopped at about the time of World War I but that there was some production until Dr. Lovejoy's death in 1926. The claims were last worked in 1940. The improvements on the Orion No. 1 consist of an upper adit, intermediate adit, and a lower adit. An old mill and cabin are on the Orion No. 2. The Orion Nos. 3 and 4 contain no improvements.

1/ By order of the Civil Service Commission, the title "Administrative Law Judge" has replaced that of "Hearing Examiner." 37 Fed. Reg. 16787 (August 19, 1972).

Sometime after 1968 a cave-in occurred in the lower adit about 180 feet from the entrance which blocks further access to it.

At the Baker hearing, Lloyd Holmgren, a mining engineer for the Forest Service, U.S. Department of Agriculture, testified that in his initial inspection he took four samples at various locations in the upper adit of the Orion No. 1 from a large quartz vein. His samples were assayed for gold, silver and nickel with a completely negative result. He found no workings or exposures in the other claims. He did not examine a winze that descended to a lower adit because he thought the 40 year old ladder was unsafe. He also did not enter the lower adit because he deemed it unsafe. He concluded from his examination that there was no longer a valuable mineral on any of the four claims. Holmgren later returned on several occasions to the property but did not take further samples. Concerning Holmgren's sampling the Judge concluded (page 7 of decision):

> Mr. Holmgren's examination may have been cursory in some respects, but it does constitute prima facie proof that there is not a valuable deposit left on the claims.

Victor Lovejoy, a son of Mrs. Gray and a mining engineer, testified that he believes that all the gold values are a complex sulphide embedded in calcite or limerock rather than in silica or quartz. He suggested that the Holmgren samples did not show values because they were from the quartz vein. B-Tr. 53. The strike of the ore zone, he said, is different from that of the quartz. B-Tr. 46. He admitted that the theory that the values are not associated with the quartz vein is novel and that, while he had thought of it some time ago, he had not voiced it until just before the hearing. B-Tr. 67. The major mining was done from an area in the upper tunnel which has been stoped to the surface. B-Tr. 47. This portion of mineralized zone is oxidized. Halfway down the winze, which drops from the floor of the upper tunnel near the stope, the oxidized zone ends and the sulphide zone begins. The oxidized zone contained "free gold" which was subject to easy recovery. The values in the sulphide zone were much harder to recover and mining stopped when it was reached. B-Tr. 47. From his work in the lower tunnel, Victor Lovejoy believes that between the lower adit and the intermediate adit there are 5000 tons of $25 to $50 ore. He did not think it was possible to get a sample from the ore he had worked in 1939-1940. Although there is another access to the lower tunnel through a winze from the intermediate tunnel, when Victor Lovejoy started down it in 1969 from the intermediate level, he ran into bad air and turned back at about the halfway point. B-Tr. 58. Thus he could not determine if the lower tunnel is flooded behind the cave-in. In any event, he did not reach the area

in the lower tunnel from which he mined in 1939-1940. He concluded with the suggestion that a prudent man would spend money on investigation to determine the tonnage and extent of the ore body. B-Tr. 61. He believed that there is sufficient mineralization to induce the expenditure of further time and money to see whether a profitable mine could be developed. B-Tr. 70.

F. E. Gray testified that he was with Holmgren on his examination of the claims. They entered the upper adit which drifts along a quartz vein and Holmgren suggested there were several places which could be mined. Gray collected a number of samples after the first hearing which he took to a local assayer; but because he thought the results were incorrect (too high) he sent the samples to the Eisenhauer Laboratories in Los Angeles. The four samples assayed $9.89; $2.61; $2.72; and $2.29 in silver per ton; 1.14 percent; .14 percent; .17 percent; and .72 percent in nickel per ton. Exhibit S.

The highest assayed sample, $9.89, was taken from a mass of material that had been pushed or washed from further back in the lower tunnel to a point 180 feet from the entrance. P-Tr. 8, 23, 24. From this point inward the tunnel is blocked by the cave-in that occurred sometime after 1966. The cave-in prevents further passage in the lower tunnel and has also caused the air in the raise connecting it to the intermediate tunnel to be bad, so that access to the lower tunnel by that route is also not feasible.

Walter Lovejoy, another son of Mrs. Gray's, who is also a mining engineer, testified at the Portland hearing. He had been unavailable at the first hearing. He stated the quartz vein Holmgren sampled is thick but contains only traces of gold and silver. He too, believed that the mineralization was not in the quartz vein but in the mineralized schist. P-Tr. 35. He believes the mineralized schist continues in depth. He testified it would take many tens of thousands of dollars to block out the ore bodies. P-Tr. 43.

He testified that at just about the point where the blockage in the lower tunnel starts a shear zone of highly fractured argillite begins in which there is silver. The lower tunnel cuts through this zone for approximately 140 feet. P-Tr. 42. Material from this zone is similar to that sampled by Gray. P-Tr. 43. Walter Lovejoy believes that there are several hundred thousand tons of ore which could be mined profitability now. P-Tr. 57. He stated that the price/cost relationship of silver was so unfavorable in the 1930's that Dr. Lovejoy had just passed it by. This area, too, is inaccessible for sampling because of the cave-in.

In answer to the question whether a prudent man would mine the claims he stated:

> Of course, at the present time, with the cost of labor and the cost of supplies, where they are in comparison to the cost of gold, why it doesn't make good economic sense to go in there and mine it right now. In other words, it costs so much for a day for a man to go out and mine this rock and so much for supplies and powder. The price of gold is still pegged down there real low. * * *
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> P-Tr. 46.

> I think something like this * * * you're talking about $50,000 and $100,000 probably to get a reasonable operation started here before you see a profit at today's price of everything. You have to put a concentrating plant in. Concentrate the material. You have to develop the mine. Equipment is very expensive nowadays. * * *
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> P-Tr. 47.

> I'm sure that if I felt there was a profit to be made for the family, we'd go down and mine it. * * * As soon as the price of our metals catches up to the price of the skyrocketing inflation here, its going to be a different story. Then, you might say it's kind of like money in the bank--this type of thing.
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> P-Tr. 47.

The Judge found that the evidence could not support a determination that there were on the claims the quantity and quality of ore sufficient to justify development and that, as a result, the claims were null and void for lack of discovery.

Contestee appeals from the Judge's decision on the basis:

(1) Insufficient evidence was presented by the Government to make a prima facie showing of nonmineralization;

(2) In the alternative, the Contestee has shown a valuable discovery and should have a right to receive the land. 2/

2/ In its appeal contestees claim that the Judge, rather than apply the established precedents concerning discovery, had set these new rules:

"(2) Whether a mining claim containing a valuable mineral deposit, which can be presently mined and marketed at a profit, must be immediately mined or lost, and cannot be held awaiting a more favorable market * * *"

Concerning the first contention, in United States v. Clyde Raymond Altman and Charles M. Russell, 68 I.D. 235, 238 (1961) it was stated:

> [W]hen the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. * * *

Accord Foster v. Seaton, 271 F.2d 836 (1959); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

In United States v. Bryan Gould, A-30990 (May 7, 1969), concerning the establishment of a prima facie case, it was stated (syllabus):

> The Government is not obligated to prove affirmatively in a mining contest either that the land claimed is nonmineral in character or that no discovery of a valuable mineral deposit within the limits of a mining claim has been made, and the Government's mineral examiners are under no obligation either to rehabilitate discovery points or to explore beyond the current workings of a mining claimant in attempting to verify a claim discovery; where a government mineral examiner testifies that he has sampled the exposed workings on a claim without finding sufficient mineral values and that

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fn. 2 (Cont.)

"(3) Whether in order to satisfy the marketability test the profit to be derived from mining must be more than claimant could earn through any other activity." (p. 3 of Brief on Appeal).

Contestee apparently came to this conclusion based on the Judge's statement:

"The younger members of the family can do better at other pursuits at the present time and the older members of the family do not have the financial resources to open the improvements and block out an ore body so that a determination can be made of whether the quality and quantity of ore is sufficient to justify development. In the absence of such a determination there is no basis for a finding that discovery requirement of the mine law has been met." (Page 7 of decision.)

We believe the Judge was merely stating the reasons why the hope or expectation of a finding of mineralization had taken place rather than a discovery. He is not attempting to establish a new ruling.

> he observed no other mineralization to sample, a prima facie case of no discovery has been made, and the burden is thereafter upon the mining claimant to show by a preponderance of the evidence a discovery has been made. 3/

The evidence presented clearly falls within the standard required to establish a prima facie case. Holmgren's actions in returning to the location of the mine on several occasions, as well as his actions during the initial inspection, give every evidence that he reasonably inspected the premises for any discovery of minerals.

It appears clear from the record that the reason for the failure of the Government's inspector, Holmgren, to conduct a more extensive sampling of the claim is because in his opinion there was nothing exposed that seemed worthy of closer examination.

A prima facie case having been established by the Government, it then became the duty of the contestee to rebut this evidence. The Department has repeatedly held that in order to constitute a discovery upon a lode mining claim there must be physically exposed within the limits of the claim a lode or vein bearing mineral of such quality and of such quantity as to warrant a prudent man in the expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine. United States v. Frank W. Whitenack, 1 IBLA 156 (1970); Jefferson Montana Copper Mines, 41 L.D. 320 (1912); Castle v. Womble, 19 L.D. 455, 457 (1894).

Although the contestees make much of the fact that they did not conduct any sampling because they were allegedly misled by the mineral examiner and that now the mineralized areas are not available for sampling, the responsibility for keeping their discovery points open is theirs. United States v. Herbert H. Mullin et al., 2 IBLA 133, (1971). To preserve the validity of a claim, the claimant must be able to demonstrate as a present fact that there is a discovery on it. This obligation would still rest upon the Grays even if Holmgren's examination had supported their contentions.

The contestees allege that there are two separate mineralized zones in the claims. One is the argillite valuable for silver and the other is the mineralized schist valuable for gold. Only the latter was extracted in the mining operations previously conducted in the claims.

3/ In the Gould case, supra, it was further stated "although the mineral examination made by the Government's mineral examiners was, admittedly, somewhat superficial, we are nevertheless convinced that it was sufficient to establish a prima facie case."

Neither one of these areas is available for sampling. Victor Lovejoy stated that the mineral values he testified to were not currently available for sampling. B-Tr. 70, 72-73. Walter Lovejoy said that the argillite silver zone is now inaccessible. P-Tr. 65-66. At the first hearing there had been no testimony that the claim was valuable for silver or any reference to this area. The Grays recognize that the alleged mineralization cannot now be sampled without prohibitive expense. Brief of contestees to the Judge, p. 8, 10, 13.

In summary, the appellants have shown that the mine was operated many years ago for gold in the oxidized schist, which has been mined out, and that the sulphide portion of the schist continues in depth, but that gold mining stopped when this zone was reached. Further, they have testified that a huge body of fractured agrillite, containing silver, is cut by the lower tunnel, but they offered only one sample taken from a mass of material washed out of the tunnel ahead of the cave-in.

The most the evidence indicates is that further exploration or prospecting is necessary to determine whether mining developments should be undertaken. This is not sufficient to meet the requirements of the prudent man test. United States v. Anton M. Ozanich et al., 7 IBLA 144 (1972); Converse v. Udall, supra; Barrows v. Hickel, 447 F.2d 80 (1971).

Although it is indisputable that the mines were worked a number of years ago and realized some value, the fact that the mines have not been worked since 1940 suggests that the claims would not now meet the requirements of the prudent man test. Contestees in presentation of evidence and in their appeal attempted to blame nonproductivity of the claims on the lack of present ability of claimants to mine and on the low market price of metals. However, this was directly refuted by one of the sons, Walter, who as quoted above stated his inclination to work the claims if there were a reasonable prospect of profit.

Moreover, it is not enough that the claims were mined in the past. As was stated in United States v. Alvis F. Denison et al., 71 I.D. 144 (April 24, 1964):

> Although a mining claim may have been valid in the past because of a discovery on the claim of a valuable deposit of mineral, the mining claim will lose its validity if the mineral deposit ceases to be valuable because of a change in economic conditions.

To conclude, the government established a prima facie case of lack of discovery. Contestees' evidence did not rebut this presumption. Under the prudent man test, the Judge correctly determined that the Orion Nos. 1, 2, 3 and 4 mining claims are null and void for the lack of a discovery of a valuable mineral deposit.

Therefore, pursuant to the authority delegated to the Board of land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

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Martin Ritvo, Member

We concur:

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Joan B. Thompson, Member

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Douglas E. Henriques, Member